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IN THE

Supreme Court of the United States

October Term, 1974
No. 73-1689

UNITED STATES OF AMERICA,

Appellant,

vs.

AMERICAN BUILDING MAINTENANCE INDUSTRIES,

Appellee.

Appeal From the United States District Court for the Central District of California.

Supplementary Brief of American Building Maintenance Industries in Support of Motion to Affirm.

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The late realization that its appeal required bolstering prompted the Government to file its brief *amicus* in *Gulf Oil Corp. v. Copp Paving Co.*[1] and to inject that brief into this case by means of a reference to it in its December 1974 Memorandum in Opposition to the Motion to Affirm.

This supplemental brief is filed pursuant to Rule 16(5) of this Court because appellee has been afforded no opportunity to respond to the *amicus* brief[2] and be-

[1]Decided by the Court on December 17, 1974, 43 U.S. Law Week. 4059.

[2]The motion of appellee American Building Maintenance Industries for leave to file an amicus brief in *Gulf Oil Corp. v. Copp Paving Co.* was denied by the Court in October of 1974.

cause the Government in its *amicus* brief seeks to raise a question not presented on this appeal.

The sole question presented by the Government's Jurisdictional Statement was:

> "*Whether a corporation which performs janitorial and maintenance services within a single state* for companies which sell products in interstate and foreign commerce, which solicits and negotiates such contracts through interstate communications, and which purchases substantial quantities of supplies originating in other states, *is 'engaged in commerce' for purposes of Section 7 of the Clayton Act.*"[3]

The Government's belated and illogical argument presented by its December 1974 Memorandum is that since "commerce" defined in Section 1 of the Clayton Act and the "trade or commerce among the several States" referred to in the Sherman Act are the same, the words, "engaged also in commerce" and the prohibition of "restraint of trade or commerce" in the Sherman Act must have the same meaning. In other words, the Government would have this Court say that *if* a corporation could be successfully prosecuted after it engaged in price fixing or some other violation of the Sherman Act which affected interstate commerce it must be deemed to be "engaged also in commerce" within Section 7 of the Clayton Act.

The argument embodies an obvious *non sequitur*. Any corporation, no matter how local or how remote its normal operations are from interstate commerce and no matter how clear its non-engagement "in commerce" has been, could be prosecuted under the Sherman Act if it combined and conspired with another to violate the Sherman Act if it were shown that the combination and conspiracy had a detrimental effect on interstate commerce. But that possibility alone cannot mean that such a local corporation is "engaged also in commerce" as that clause is used in Section 7 of the Clayton Act.

[3]Jurisdictional Statement, page 2, emphasis added herein unless otherwise noted.

Our inquiry here is whether the Benton companies were "engaged also in commerce" prior to the acquisition—not whether they were corporations subject to prosecution under the Sherman Act. No one has even intimated that the Benton companies have violated, or otherwise become subject to the Sherman Act, or for that matter any other anitrust statute. They cannot be deemed to have done anything which adversely "affected" interstate commerce within the ambit of the Sherman Act, absent proof that they violated that Act. Since the Benton companies have not become subject to the Sherman Act the Government cannot say that they are within the terms of the Clayton Act because they could have been subject to the Sherman Act *if* they had combined and conspired to detrimentally affect interstate commerce.

Accordingly, it avails the Government nothing to transpose the Clayton Act words "engaged also in commerce" into the Sherman Act concept "engaged in detrimentally affecting interstate commerce" because the Benton companies cannot be brought within either.

Even under the Sherman Act principles, it is only acts and practices which have substantial adverse effects on interstate commerce which are within that statute. *Gulf Oil Corp. v. Copp Paving Co.*, ... U.S.

....., 43 U.S. Law Week. 4059, 4064 (1974), citing *United States v. Yellow Cab Co.*, 332 U.S. 218, 230-234 (1947). This fundamental requirement is expressed in each of the Sherman Act cases relied upon by the Government in its December 1974 Memorandum.[4] If jurisdiction under the Sherman Act is to be founded upon an effect upon interstate commerce, the challenged restraint must have detrimental economic effect on that commerce. There is no suggestion here that the activities of the Benton companies had any such adverse effect.

A foundation of the Government's argument is its erroneous statement in its *amicus* brief that in enacting the Clayton Act "Congress intended to exercise the full extent of its constitutional power to regulate commerce."[5] The fact is that Section 7 of the Clayton Act is one of the narrowest of the antitrust laws.

Both as enacted in 1914 and as reenacted in 1950, Congress applied the prohibitions of Section 7 to corporations only. No acquisition by a natural person, regardless of the extent of his operations, and regardless of the extent or effect of his acquisitions, is, or has been, subject to its prohibitions.

When initially enacted in 1914, Section 7 did not purport to "exercise the full extent" of Congressional power since it applied only to the acquisition of stock. No acquisition of assets, no matter how large, and regardless of the extent or the effect of the acquisition, was then subject to its prohibitions. In 1950, when the

[4]*Burke v. Ford*, 389 U.S. 320, 321 (1967); *Fortner Enterprises v. U.S. Steel*, 394 U.S. 495, 501 (1969), and *Rasmussen v. American Dairy Association*, 472 F.2d 517, 522 (9th Cir. 1973).

[5]Brief for the United States as Amicus Curiae, page 8.

prohibitions of Section 7 were extended to cover the acquisition of assets, the limitation of its application only to corporations was continued.

Moreover in the enactment of Section 7 in 1914, and its reenactment in 1950, Congress explicitly provided that it applied only to a corporation "engaged in commerce" whose transaction was with another corporation "engaged also in commerce." Regardless of how broadly one construes the words "in commerce," it remains explicit that both parties to the acquistion must be engaged in commerce. No matter how extensive the operations of one party to the transaction, it is clear that Section 7 cannot apply unless both parties to the transaction were so "engaged."

Under the Government's premise here, Congress had the power to regulate any such acquisition regardless of the activities of the person or entity on the other side of the transaction. But Congress did not do so.

Moreover, Congress did not do so either in 1914 or in 1950 notwithstanding the fact that at both times it had before it, as a model if it intended to utilize its full power, the all inclusive provisions of the Sherman Act, which in Section 1 was explicitly made to cover "*Every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. . . ."[6] And in Section 2 it was explicitly made to cover "*Every* person who shall monopolize, or attempt to monopolize . . . *any* part of the trade or commerce among the several States . . ."[7] The election of Congress not to follow the all inclusive kind of language found in the earlier

[6]Sherman Act, §1 (15 U.S.C. §1).

[7]Sherman Act, §2 (15 U.S.C. §2).

Sherman Act demonstrates that Congress did not in Section 7 of the Clayton Act exercise, or intend to exercise, "the full extent of its constitutional power to regulate commerce." Accordingly, cases defining the scope of the Sherman Act, which the Government cites, are not helpful to any determination of the scope of Section 7 of the Clayton Act.

The Government's argument disregards the fact that Section 7 has not one but three prerequisites to its application:

> *First*, the acquiring corporation must be "engaged in commerce";
>
> *Second*, the acquired corporation must be "engaged also in commerce"; and
>
> *Third*, the effect of such acquisition "may be substantially to lessen competition, or to tend to create a monopoly."

By contrast, Sections 1 and 2 of the Sherman Act have only the single standard of application, *viz.*, the anti-competitive effect of the defendant's conduct. The Government would have this Court disregard the fact that in Section 7 Congress, separately and apart from its definition of the parties made subject to its prohibition, defined the action by those parties which was prohibited. Not all acquisitions of corporations engaged in commerce violate Section 7. No one has contemplated that any but a small percentage of corporate acquisitions would be subject to Section 7. For instance, there were 3,158 mergers recorded in 1972 and 2,826 mergers recorded in 1973,[8] only a few of which were challenged by the Department of Justice or the Federal Trade Commission. It is only acquisitions by corpo-

[8]Federal Trade Commission News Release of November 1, 1974.

rations engaged in commerce of corporations engaged in commerce, the effect of which acquisitions "may be substantially to lessen competition, or to tend to create a monopoly," that violate Section 7.

The Court below held that the acquired Benton companies were not engaged in commerce finding that they "conducted their businesses entirely within Los Angeles, Orange and Ventura Counties in California" and that the business of providing janitorial services is an "intensely local activity."[9]

The Government does not contest these findings. Rather it asserts that the activities of the Benton companies "affect commerce because of Benton's purchase of goods originating in other states" and the services performed for its customers "had a significant effect upon the flow of commerce."[10] But these purported effects would not give rise to jurisdiction even under the broad language and principles of the Sherman Act because the Benton companies had not caused any *adverse* effect on interstate commerce. Benton's purchase of goods which had passed in interstate commerce and the providing of requested services to customers could not have a detrimental effect on such commerce.

It is difficult, if not impossible, to conceive of any business which could have less of an engagement in commerce than the business of the Benton companies.

[9]Findings 1, 4, 11, 16, 22 and 23 of the District Court's Findings of Fact and Conclusions of Law attached as Appendix A to the Jurisdictional Statement, hereinafter "Findings."

[10]Memorandum for the United States in Opposition to Motion to Affirm, page 2.

Theirs was the business of supplying local labor to local buildings. Incidental to their business was their purchase of mops, pails, soaps, etc., which were purchased without regard to their point of origin from local vendors. None of these purchases were made by ordering the goods from vendors situated out of the State.[11] The Benton companies did not advertise nationally; they did not enter into any requirements or continuing supply contracts with any supplier.[12]

In its December 1974 Memorandum, the Government asserts three propositions.

First, it is said that "the activities of Benton . . . affect commerce because of Benton's purchase of goods originating in other states." Notwithstanding the fact that these purchases were made from local suppliers, the Government calls these purchases as made "through" local suppliers, and seeks to denominate them "indirect" purchases, and it is suggested that "indirect purchases may substantially 'affect' commerce." The fact is that the purchases of the Benton companies were entirely completed within the state. They were not made from someone else "through" a local supplier, and they were not "indirect" but were purchases in which only the local purchaser and the local supplier were involved. While it is stated that these purchases "affect commerce," there is not the slightest intimation as to how. Under the Government's theory, it is equally true that any purchase by the Benton companies, or a failure to

[11]The only exceptions were real estate publications costing $13.39, a reel rack costing $25.01, an income tax publication costing $79.98 and a sign costing $11.97. All of these out-of-state purchases were properly found by the trial court to be *de minimus*. Findings 7 and 13.

[12]Findings 8, 14 and 17.

purchase by the Benton companies, could "affect commerce." A purchase of locally manufactured goods in preference to out-of-state manufactured goods would result in less out-of-state transportation into the state, and thus "affect commerce." As we have seen above, if the engagement of the Benton companies in commerce is to be judged by the "effect" of their purchases on commerce, it must by every antitrust principle be a detrimental effect on commerce arising from some illegal act of the Benton companies, which has not been claimed. The Benton companies cannot be judged to be "engaged also in commerce" by merely purchasing from local suppliers.

Second, it is asserted that the janitorial services that the Benton companies performed for its customers had a "significant effect upon the flow of commerce." This is nothing more than an effort to say that the Benton companies were "engaged also in commerce" because some of their customers engaged in interstate business. If that proposition could be sustained, it would mean that virtually everyone was "engaged in commerce" no matter how local their activities. Here again, the Government does not describe the detrimental effect which the janitorial services of the Benton companies had upon the flow of commerce. It is asserted that the Benton companies were engaged in commerce because the "price and quality" of their janitorial services had an "impact" upon their customers' operations. In other words, the Government is saying that the question as to whether janitors are engaged in commerce, within Section 7, depends on whether they are good (or bad) janitors and whether their prices are too high (or low). That ambiguous concept cannot be an appropriate standard for judging the question presented here.

Third, it is said that the mere existence of incidental "interstate negotiations" in the sale of janitorial services were significant regardless of their cost (meaning regardless of their extent).[13] Since the record is silent upon the content of the interstate communications on which the Government relies, it is unable even to assert that they had any effect upon interstate commerce. Regardless of their content, and even under the Sherman Act, it is clear that jurisdiction cannot be sustained on the basis of interstate communications conducted in the regular course of an otherwise purely local business. *John Kalin Funeral Home, Inc. v. Fultz*, 313 F.Supp. 435 (W.D. Wash. 1970), *aff'd.* 442 F.2d 1342 (9th Cir. 1971) *cert. den.* 404 U.S. 881 (1971).

The Government makes no contention that there was any impropriety in the presentation or the consideration of the motion for summary judgment. The Government was given a full opportunity to present the facts and it has never contended to the contrary.

It has been accepted as fact that the Benton business was an intensely local activity. It consisted of supplying local unskilled labor to clean local buildings. There is an uncommon ease of entry into the business, and it is therefore one wherein there is a high level of competition. Customer contracts are generally terminable upon 30 days notice, a fact which contributes to the high level of competition on the basis of price and quality.

[13]The Government relied upon the existence of 201 interstate letters sent and received by the Benton companies in one year and a half prior to the acquisition, and 13 interstate telephone calls made and received by the Benton companies during the same period. There was no effort made to show what was said either in the telephone calls or the letters. While the interstate letters were produced to the Government, they were never made a part of the record.

Janitors, moreover, are subject to the competition of their customers who may and frequently do provide their own janitorial services in-house.

The appeal presented by the Government is not substantial and appellee's motion to affirm should be granted.

Respectfully submitted,

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